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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1956

No. ~~1958~~ 160

CHARLIE E. MAY,
Petitioner

vs.

ELLIS TRUCKING CO., INC.
a Corporation,
Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

SUBJECT INDEX

	Page
PETITIONERS JURISDICTIONAL STATEMENT	1
Opinions Below	2
Grounds upon Which Jurisdiction is Invoked	2
A. Judgments to be Reviewed	2
B. Statutory Provisions Conferring Jurisdiction	2
Questions Presented for Review	3
Statutes Involved	4
Statement of the Case	4
A. Nature of the Action	4
B. Federal Jurisdiction	5
C. The Pleadings	5
D. Relevant Facts	6
E. Substance of the Proof	6
F. Proceedings	8
ARGUMENT	9
The Federal Questions are Substantial	9
Proceedings in Trial Court	10
I. Constitutional Right to Trial by Jury	11
A. Denial by Trial Court	11
B. Court of Appeals Refused Review	15
II. Invasion of Province of Jury	17
III. Remittitur Practice and Trial Courts Discretion	21
IV. Review of Remitted Verdict	26
A. Supervisory Power of Supreme Court	26
B. Abuse of Discretion by Trial Court	29
V. Is this Verdict in Fact Excessive?	31
A. Proceedings	31
B. Petitioners Injuries Permanent	31
C. This Verdict is Not Excessive	35
CERTIFICATE OF SERVICE	42

INDEX (Continued)

INDEX TO APPENDIX

Page

APPENDIX A — Judgment of Court of Appeals 43
APPENDIX B — Judgment of District Court 44

TABLE OF CASES

Aetna Cas. Co. v. Flowers, 330 U. S. 464, 91 L. Ed. 1074, 67 S. Ct. 798 27
Aiken v. Wisconsin, 195 U. S. 194, 206, 49 L. Ed. 154, 160, 25 S. Ct. 3 12
Am. Eagle Fire Ins. Co. v. Eagle Star Ins. Co., 216 F. 2d 176, (9th Cir. 1954) 16
Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654, 657, 79 L. Ed. 1636, 55 S. Ct. 890, 891 (1935) 18
Barry v. Edmunds, 116 U. S. 550, 29 L. Ed. 729, 6 S. Ct. 501, 509 13
Cole v. Chicago, St. P. M. & O. Ry. Co., 59 F. Supp. 443, 446, (D.C.D. Minn. 1945) 23
Constantine v. A. & S. R. Co., 144 F. Supp. 39 25
Dimick v. Schiedt, 293 U. S. 474, 79 L. Ed. 603, 55 S. Ct. 296 ..... 16, 21
Donovan v. Pa. Co., 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91 28
Ellis v. Union Pacific R. Co., 329 U. S. 649, 91 L. Ed. 572, 67 S. Ct. 598 (1947) 20
Foster Creighton Co. v. Hale, 32 Tenn. App. 208, 222 S.W. 2d 222 35
Galena Oaks Corp. v. Scofield, 218 F. 2d 217 (5th Cir. 1954) 16
Gasoline Products v. Champlin Refining Co., 283 U. S. 494, 75 L. Ed. 1188, 51 S. Ct. 513 28
Gibson v. Lockheed Aircraft Service, Inc. 350 U. S. 356, 100 L. Ed. 395, 76 S. Ct. 366 26
Heavy Haulers v. Jones, Okla. , 304 P. 2d. 292 (1956) 26
International Paper Co. v. Busby, 182 F. 2d 790, 793 (5th Cir. 1950) 30
Jones v. Atlantic Refining Co., 55 F. Supp. 17, 19 (D.C.E.D. Pa. 1944) 23
Jones v. East Tenn. V. & G. R. Co., 128 U. S. 443, 32 L. Ed. 478, 9 S. Ct. 118 12
Kennon v. Gilmer, 131 U. S. 22, 23, L. Ed. 110, 9 S. Ct. 696 16
Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209, 67 S. Ct. 1009 27
Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740 (1946) 20
Majestic v. L & N, 147 F. 2d 621 (6th Cir. 1945) 38
Meissner v. Papas, 35 F. Supp. 676 (D.C.E.D. Wis. 1940); Aff'd. 124 F. 2d 720 (7th Cir. 1941) 30

TABLE OF CASES (Continued)

	Page
Milprint, Inc. v. Donaldson, 222 F. 2d 898 (8th Cir. 1955)	22
Pariser v. City of New York, 146 F. 2d 431, 433 (2nd Cir. 1945)	22
Railroad v. Porter, 117 Tenn. 13, 94 S.W. 666	38
Reisberg v. Welters, 111 F. 2d 595 (6th Cir. 1940)	29
Rogers v. Missouri Pac. R. R., U. S. 77 S. Ct. 443 (1957)	27
Sebring Truck Co. v. White, 187 F. 2d 486 (6th Cir. 1951)	29
Skelly v. New York, N. H. & Hartford R. Co., 93 F. 2d 479 (2nd Cir. 1938)	27
So. Ry. Co. v. Madden, 235 F. 2d 198 (4th Cir. 1956); Cert. den. 352 U. S. 953; 1 L. Ed. 2d 244, 77 S. Ct. 328	22
Spero-Nelson v. Brown, 175 F. 2d 86 (6th Cir. 1949)	29
Steiner v. U. S. 229 F. 2d 745 (9th Cir. 1956)	22
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248	28
Tenn. Coal & Railroad v. Roddy, 85 Tenn. 400 (1887)	25
Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409 (1943)	19
Thompson v. Camp, 167 F. 2d 733 (6th Cir. 1948)	28
Thoni v. Hayborn, 37 Tenn. App. 56, 260 S.W. 2d 376 (1953)	17
Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 87 L. Ed. 610, 63 S. Ct. 444	12, 18
U. S. v. General Motors Corp., 323 U. S. 373, 89 L. Ed. 311, 65 S. Ct. 357	27
United States v. Munsingwear, 340 U. S. 36, 95 L. Ed. 36, 71 S. Ct. 104	26
Waller v. Skeleton, 31 Tenn. App. 103, 212 S.W. 2d 690, 697 (1948)	32, 35
Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. Ed. 235, 10 S. Ct. 1044	12
Walling v. Reuter, 321 U. S. 671, 88 L. Ed. 1001, 64 S. Ct. 826	26
Werthan Bag Corp. v. Agnew, 202 F. 2d 119, 123 (6th Cir. 1953)	17
Wesco Paving Co. v. Nash, 35 Tenn. App. 409, 245 S.W. 2d 782	35
White v. Seier, 37 Tenn. App. 437, 264 S.W. 2d 241 (1953)	32
Widder v. N. Y., Chicago & St. L. Ry., 142 F. Supp. 85[illegible]	25
Wilkerson v. McCarthy, 336 U. S. 53, 55, 70, 93 L. Ed. 497, 69 S. Ct. 413 (1949)	27
Yorkonis v. Delaware L & W. R. Co., 213 Federal 537, 538 (D.C.E.D. N. Y. 1914); Aff'd. 220 F. 429 (2nd Cir. 1915); Aff'd. 238 U. S. 439, 59 L. Ed. 1397, 35 S. Ct. 902 (1915)	30

STATUTES CITED

	Page
Amendment VII — Constitution of United States	4, 11
62 Stat. 928, C. 646 — June 25, 1948	3
62 Stat. 930, C. 646 — June 25, 1948	5
62 Stat. 963, C. 646 — June 25, 1948	4
Federal Rules of Civil Procedure — Rule 59	28
Supreme Court Rule 19(1)(b)	3, 26
Supreme Court Rule 23	1
Title 28, United States Code, Section 1254(1)	3
Title 28, United States Code, Section 1332	5
Title 28, United States Code, Section 2106	4, 26
Title 28, United States Code, Rule 59	28

AUTHORITIES CITED

6 Moore's Federal Practice (2nd Ed.) pg. 3744 et seq.	30
6 Moore's Federal Practice (2nd Ed.) pg. 3836 et seq.	29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1956

No.

CHARLIE E. MAY,
Petitioner

vs.

ELLIS TRUCKING CO., INC.
a Corporation,
Respondent

PETITIONER'S JURISDICTIONAL STATEMENT

ON PETITION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In compliance with Rule 23 of the Rules of the Supreme Court of the United States as amended, Petitioner files this, its Petition for Writ of Certiorari, to review the judgment of the United States Court of Appeals for the Sixth Circuit entered March 6, 1957, which set aside the Order of the District Court of the United States for the Western District of Tennessee entered May 8, 1956 and remanded the case to the trial Court for a reconsideration by the trial Court of the Motion for New Trial filed by the defendant-respondent.

Petitioner submits this statement to show that the Supreme Court of the United States has jurisdiction of this Petition for Writ of Certiorari and that substantial federal questions are presented whereby Petitioner has been deprived of his constitutional right to trial by jury guaranteed

to him under the VII Amendment to the Constitution of the United States.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit is not yet reported in the Federal Reporter; however, it is set forth in Appendix A hereto, pp. 43.

The Order of the United States District Court for the Western District of Tennessee Overruling the Motion for New Trial and Directing Remittitur and Final Judgment is set forth in Appendix B hereto, pp. 44.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

A. JUDGMENTS TO BE REVIEWED

1. The United States Court of Appeals for the Sixth Circuit entered a judgment setting aside the judgment of the United States District Court for the Western District of Tennessee (App. 105a) and remanded this case to the District Court for a reconsideration of the Motion for New Trial (App. 90a) filed by defendant-respondent. This judgment is dated and was entered on March 6, 1957, a copy of which is made Appendix A hereto, pp. 43.

2. The United States District Court for the Western District of Tennessee, upon Motion for New Trial filed by defendant-respondent, entered an Order overruling Motion for New Trial and Directing Remittitur and Final Judgment on May 8, 1956, dated the same day, a copy of which is made Appendix B hereto, pp. 44.

B. STATUTORY PROVISIONS CONFERRING JURISDICTION

1. The jurisdiction of the Supreme Court of the United

States to review the decision and judgment of the Court of Appeals as well as the District Court by Writ of Certiorari is conferred by Acts of Congress, June 25, 1948, c. 646, 62 Stat. 928.

Title 28 United States Code, Section 1254 (1)

2. Jurisdiction is also conferred by the provisions of Supreme Court Rule 19 (1)(b).

QUESTIONS PRESENTED FOR REVIEW

1. Did the action of the District Court, upon the hearing of respondent's Motion for New Trial, in reweighing the evidence submitted to the jury on the factual question concerning the permanent nature of petitioner's personal injuries, and deciding this fact question contrary to the jury's decision of the same (App. p. 102a-104a), invade the province of the jury and deny petitioner his right to a jury trial as guaranteed him by Amendment VII to the Constitution of the United States?

2. Did the District Court in approving the verdict of the jury and stating that a new trial was not necessary in this case (App. p. 102a) and in overruling the Motion for New Trial, directing a remittitur and entering judgment as so remitted so abuse his discretionary powers in acting on a Motion for New Trial as to require the Court of Appeals to exercise its powers of supervision and review over the lower Federal Court?

3. Did the Court of Appeals, in refusing to consider the constitutional issues raised on appeal by petitioner from the District Court's judgment, and in remanding the case to the District Court for a reconsideration of the Motion for New Trial without passing upon the District Court's invasion of the province of the jury and reweighing the evidence in the case, thereby abdicate its function of super-

vising the lower Federal Court, deny Petitioner his right to review on appeal, lend approval to the District Court's action in invading the province of the jury contrary to repeated decisions of this Court and deny Petitioner his right to a jury trial as guaranteed to him by Amendment VII to the Constitution of the United States?

STATUTES INVOLVED

1. AMENDMENT VII—CONSTITUTION OF THE UNITED STATES

> "In suits at common law, where the value in controverty shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. ACTS OF CONGRESS, June 25, 1948, c. 646, 62 Stat. 963

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further poceedings to be had as may be just under the circumstances."
>
> Title 28 United States Code, Sec. 2106

STATEMENT OF THE CASE

A. NATURE OF THE ACTION

This is a suit in tort by Petitioner, Charlie E. May, plaintiff in the trial Court, brought against the Respondent, Ellis Trucking Co., Inc., defendant in the trial Court, for property damages and permanently disabling personal in-

juries he sustained arising out of an accident which occurred on July 13, 1955, in Memphis, Tennessee.

B. FEDERAL JURISDICTION

Jurisdiction was founded upon diversity of citizenship between the parties, the plaintiff and defendant being citizens and domiciled in different states, and amount, the matters in controversy exceeding, exclusive of interest and costs, the sum of three thousand ($3,000.00) dollars.

Title 28 United States Code, Sec. 1332 Acts of Congress June 25, 1948, c. 646, 62 Stat. 930

C. THE PLEADINGS

September 12, 1955 Petitioner filed his complaint in the United States District Court for the Western District of Tennessee, setting forth the relevant facts of the case and alleging Common Law negligence (App. 5a-7a); negligence in violating Memphis City Ordinances (App. 9a); negligence in violating Tennessee State Statutes (App. 10a-11a); and alleging that as a direct and proximate result Petitioner's automobile was virtually demolished (App. 11a-12a); and that Petitioner sustained severe, serious and permanent injuries (App. 7a-8a).

October 6, 1955 respondent filed its Answer denying all the allegations of negligence, violation of City Ordinances and State Statutes and the nature and extent of petitioner's personal injuries and property damage (App. 13a-15a).

February 29, 1956 the parties stipulated as to the property damage in the amount of $1110.00 which is not here involved. Petitioner was permitted to amend his original Complaint to show the surgical removal of two ruptured and herniated intervertebral discs from his back (App. 15a-17a).

No other pleadings are relevant or necessary to this hearing.

D. RELEVANT FACTS

On July 13, 1955 at approximately 3:30 in the afternoon the petitioner was proceeding Southwardly down Third Street in the City of Memphis, Tennessee, driving his 1954 Ford automobile. When he arrived at about the intersection of South Third Street and Lucy Street he stopped in the line of traffic behind a Plymouth automobile whose driver had indicated he was going to make a left turn onto Lucy Street. While the petitioner was so stopped the respondent's 1952 International tractor-trailer truck, driven by respondent's employee, John R. Pruett, rammed the petitioner's automobile from the rear knocking the petitioner's automobile into the Plymouth automobile in front of him and off to the side where petitioner ended up some 150 feet from the point of impact.

As the direct and proximate result of this collision petitioner's automobile was completely demolished and he was very seriously and permanently injured.

Liability of the respondent was conceded without fault upon the part of petitioner as is stated by respondent's counsel: "I did not and never did feel that the defendant (respondent) should have a verdict in the case". (App. 93a). The issue of liability was not raised by respondent on its Motion for New Trial (App. 90a-93a); nor was it raised in the Court of Appeals (App. 106a); and it is not in issue on the Petition for Writ of Certiorari.

E. SUBSTANCE OF THE PROOF

It is not necessary to the issues raised on this Petition to

burden the Court with a recitation of all the proof for the Appendix filed in the Court of Appeals is also filed with this Petition (Supreme Court Rule 21). Respondent introduced only one witness, its truck driver, whose testimony was on the issue of liability which has been conceded. The Petitioner introduced himself, his family and his employer, all of whose testimony is uncontroverted (App. 18a-43a); (63a-84a). Petitioner also introduced the deposition of Dr. Robert Raskind (App. 44a-62a) whose testimony is not controverted by any witness. Dr. Raskind testified that he was the treating neurosurgeon who hospitalized petitioner on four separate occasions for physio-therapy and traction (App. 44a), myelography (App. 48a-49a), surgical removal of two ruptured and herniated intervertebral discs in plaintiff's low back at L4 and L5 inter-spaces (App. 45a), and for further physio-therapy (App. 52a) because petitioner had too much post-operative irritability in his back and had not received the relief Dr. Raskind expected from the disc removals (App. 52a-53a). The testimony of Dr. Raskind is not oral but by way of deposition. He testified that as a result of this operation, in which the two intervertebral discs were removed, the petitioner would not have as good a back as before the operation nor be able to bear the weight he could bear before (App. 59a); that at the time of trial petitioner had a 25% disability of the body as a whole (App. 53a); that he, Dr. Raskind, was not happy with this 25% permanent partial disability as he usually did better than that, usually it is 10% to 15% (App. 61a); and that petitioner would always have a permanent partial residual disability (App. 62a).

Respondent introduced no medical proof even though at the request of respondent petitioner was examined by a physician of respondent's choice who made a report of his examination (App. 36a).

F. PROCEEDINGS

The case came on for trial before the Court and jury, and after the introduction of proof and arguments of counsel was submitted to the jury upon the charge of the Court that they would consider petitioner's future loss of earning capacity, if any, as a result of his alleged future permanent disability (App. 86a) and this over the objection and exception of the respondent (App. 87a-88a).

The jury returned a general verdict assessing petitioner's personal injuries at $42,500 (App. 88a) upon which judgment was entered (App. 89a).

Respondent filed its Motion for New Trial (App. 90a-93a) in which liability was conceded (App. 95a). This Motion for New Trial alleged the Court was in error in submitting to the jury the issue as to whether petitioner had sustained a permanent disability (App. 90a-93a) which was overruled (App. 102a).

The District Court overruled the Motion for New Trial, vacated and set aside the judgment entered on the jury verdict, directed a remittitur reducing the jury verdict to $25,000 and entered final judgment as so remitted by the Court (App. 105a).

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit from so much of the Order of the District Court as vacated and set aside the judgment entered on the jury verdict, directed a remittitur and entered final judgment on the jury verdict as so remitted (App. 106a).

The cause was argued and submitted to the Court of Appeals on February 20, 1957, and on March 6, 1957, a judgment was entered in the Court of Appeals setting aside the judgment of the District Court and remanding the case

to the District Court for a reconsideration of the Motion for New Trial (Appendix A hereto, pp. 43).

This Petition for Writ of Certiorari is filed to review the judgment of the Court of Appeals which refused to consider Petitioner's appeal that he had been denied his right to a jury trial and also to review the action of the District Court in invading the province of the jury and re-weighing the evidence contrary to repeated decisions of this Court.

ARGUMENT

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The unblemished right to trial by jury is so deeply rooted in the concepts of our heritage as to be the very foundation of our judicial system. Amendment VII to our Constitution is undoubtedly better known than any other provision. And yet, we have reached that improbable impasse here where the trial Court submitted this case to our Constitutionally appointed tribunal to try fact questions and then upon their rendering a decision the trial Judge has redetermined it to suit his own ideas of the facts. The trial Court submitted this case to the jury on the question of permanent injury for them to mete out justice; but, when the jury so evidently found permanent injuries and awarded damages therefor, the trial Court then takes the case away from the jurors and awards damages according to his own ideas of the facts regardless of this act being unconstitutional, unlawful and highly prejudicial to the plaintiff. The trial Court submitted the case to the jurors for them to determine if there were any permanent injuries, a factual question, and when the jury so evidently found the trial Court castigates the jury verdict simply because his opinion or appraisal of this factual question was contrary.

All of this the Court of Appeals has refused to consider, merely approving the trial Court's invasion of the province of the jury and disapproving of the way in which the trial Court entered judgment. The Court of Appeals has by its refusal to consider this question spawned a legal consequence which the Supreme Court has repeatedly condemned. With this decision standing the Court of Appeals has approved what the trial Court did though not the manner in which it did it and in effect has said that no matter what invasion of the province of the jury the trial Court may make on motion for new trial they will not review his actions even though the case is properly before them for review.

PROCEEDINGS IN TRIAL COURT

This case in its simplest form in the trial Court presented only factual questions in controversy, questions about which reasonable minds could differ and therefore questions for the jury's determination. The trial Court in its charge submitted to the jury for their consideration the fact issue as to whether or not plaintiff had sustained a permanent disability (App. 86a). The respondent excepted to this submission by the trial Court without success (App. 87a). The jury returned a general verdict (App 88a) upon which judgment was entered (App. 89a). Thereafter, respondent, conceding liability, filed its motion for new trial again attacking the trial Court's submission of this factual issue to the jury (as to plaintiff's permanent disability) (App. 90a-93a) and the trial Court overruled this motion (App. 102a).

The trial Court then took it upon itself to reweigh the evidence ("Mr. May, the plaintiff in this case, sustained an injury which made a disc operation necessary but it would

be highly speculative to say he suffered a permanent disability.") (App. 103a), invade the province of the jury and withdraw from its consideration this factual question already decided by them and he then redetermined it. The trial Court entered its own judgment (App. 105a) vacating and setting aside the prior judgment entered on the jury verdict (App. 89a).

The Court of Appeals refused to consider what the trial Court did. It considered only the way in which the trial Court entered judgment (Appendix A hereto, pp. 43).

I. CONSTITUTIONAL RIGHT TO TRIAL BY JURY

A. DENIAL BY TRIAL COURT

The fundamental right to a trial by jury was considered by our forefathers so absolutely necessary to our judicial system that they would not ratify the Constitution of the United States until the so-called "Bill of Rights" was adopted. As a part of this "Bill of Rights" there is Amendment VII which reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."
>
> Constitution of the United States
> Amendment VII

For a Court to invade the province of the jury and re-examine facts which have been tried by that jury otherwise than according to the rules of the common law is an unconstitutional invasion of a party's basic heritage. No Court has that right and it is the primary function of appel-

late Courts to guard, with jealous zeal, the constitutional rights of all people.

We say here that this constitutional guarantee of a jury trial has been denied to petitioner by the trial Court. That Court deprived the petitioner of his right to have the jury ascertain the damages to which he was entitled, which were unliquidated, and arbitrarily substituted its own judgment for that of the jury. The trial Court ascertained, not only the amount due petitioner, which is a fact question, but whether or not he had sustained a permanent disability, which is also a fact question. All of this after the trial Court had approved the jury verdict, said no new trial was necessary and said the jury had no improper motive.

This Court has many times said that where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences, the constitutionally appointed tribunal to decide these disputed questions of fact is the jury.

> Jones v. East Tenn. V & G R Co.,
> 128 U.S. 443, 32 L. Ed. 478, 9 S. Ct. 118;
> Washington & G R Co. v. McDade,
> 135 U.S. 554, 34 L. Ed. 235, 10 S. Ct. 1044;
> Tiller v. Atlantic Coast Line R. Co.,
> 318 U.S. 54, 87 L. Ed. 610, 63 S. Ct. 444.

The trial Court's predicate for its action—"The Court is constrained to say there must have been a misapprehension of the evidence by the jury on the injury and damage question" (App. 102a)—is completely contrary to the position of this Court as stated by Mr. Justice Holmes:

> "But it must be assumed that the Constitutional tribunal does its duty and finds facts only because they are proved."
>
> Aikens v. Wisconsin, 195 U.S. 194, 206,
> 49 L. Ed. 154, 160, 25 S. Ct. 3.

For the trial Court simply to say the jury verdict is excessive does not make it so — nor does his statement that there is no evidence of permanent injuries make it so; for the trial Judge's comment that the judgment was excessive because no permanent injury was shown is not supported by the uncontradicted testimony of the treating doctor that "I am not happy with a 25% permanent partial disability" (App. 61a); that regardless of any improvement from 25% he expected petitioner to have a permanent disability (App. 62a) which would likely be 10% to 15% (App. 61a) "if the physio-therapy is a success" (App. 53a) which it had not been in the past. Petitioner's recovery in this case is well supported by his proved detriment. This may have been a controverted issue and the jury might have disbelieved this uncontroverted evidence by the doctor; however, it is still a factual issue and the case did not compel the jury to disregard the evidence of permanent injury as the trial Court has done here on the motion for a new trial. The trial Court had submitted to the jury the question if there were permanent injuries on the same evidence which he later said showed no such injuries.

This interference with the jury's determination of damages was early condemned in the case of Barry v. Edmunds, 116 U. S. 550, 29 L. Ed. 729, 6 S. Ct. 501, 509 (1886) wherein a trial court dismissed a case, without submitting it to the jury, upon the ground that *in the Court's opinion the damages sought and allowable didn't equal the jurisdictional amount of the Court.* The Supreme Court of the United States in reversing stated:

> ". . . It adds, indeed, to the principal error, if any distinction can be made, that which consists in encroaching upon the province of the jury. For nothing is better settled than that, in such cases as the present, *and other actions for torts where no precise rule of*

> *law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict.* In Whipple v. Cumberland Mfg. Co., 2 Story 661, 670, Mr. Justice Story well expressed the rule on this subject that a verdict will not be set aside in a case of tort for excessive damages 'unless the Court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated'—that is 'unless the verdict is so excessive or outrageous,' with reference to all the circumstances of the case, 'as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.' *In no case is it permissible for the Court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence as the standard and measure of that justice which the jury itself is the appointed constitutional tribunal to award.*" (Emphasis supplied).

The trial Court specifically stated that there was no improper motive on the part of the jury and none was claimed by the respondent (App. 102a) and the Court did not find that the jury was unduly sympathetic for petitioner (App. 103a). The trial Court predicated its action by saying that in its view the size of the verdict alone showed prejudice on the part of the jury and that they must have acted under a misapprehension of the evidence. Certainly the record does not bear out the trial Court in its statement that the jury misapprehended the evidence for apparently this is based solely upon his view that "it would be highly speculative to say he suffered a permanent disability" (App. 103a) which is in itself a factual question for determination by the jury and the evidence in respect thereto is not subject to reweighing by the trial Court. The record

speaks for itself in this regard because the only medical testimony is by way of deposition. It is as easy for the Court of Appeals and the Supreme Court as it is for the trial Court to determine from this deposition whether or not there is sufficient evidence of a permanent disability to take that question of fact to the jury. Once it is determined that a controversy exists upon which reasonable minds may differ, as the trial Court so found, the power of the trial Court (or for that matter of any court) to reweigh this controversial question and decide it, is nonexistent; and, an exercise of such a power to reweigh the evidence will be struck down as unconstitutional by this Court. No other right is talked about more or so jealously guarded by this Court as the right to trial by jury of factual issues and this rightly so. Once we make inroads on this constitutional right we pave the way for jury decisions by judges.

B. COURT OF APPEALS REFUSED REVIEW

After the trial court had withdrawn this case from the jury and rendered judgment on its own determination of the facts, contrary to the jury verdict, petitioner appealed to the Court of Appeals presenting essentially two constitutional questions: (1) Does the trial Court have the right arbitrarily and without the consent of the petitioner to enter a remitted verdict; and (2) was the trial Court's action in invading the province of the jury by reweighing the evidence on the issue as to permanent injury a denial to petitioner of his constitutional right to trial by jury? Each of these questions arose under Amendment VII to the Constitution of the United States.

The Court of Appeals, in its judgment (Appendix A hereto, pp. 43), decided that the trial Court had no constitutional right to enter a remitted judgment after a jury

verdict and reversed the trial Court upon the authority of Kennon v. Gilmer, 131 U. S. 22, 33 L. Ed. 140, 9 S. Ct. 696 and Dimick v. Scheidt, 293 U. S. 474, 79 L. Ed. 603, 55 S. Ct. 296. However, it refused to consider and decide the issue raised as to the unconstitutional act of the trial Court in invading the province of the jury merely remanding the case to the trial Court for a reconsideration of the Motion for New Trial. The Court of Appeals thereby sanctioned the action of the trial Court in redetermining a fact issue and deprived petitioner not only his right to a jury trial as guaranteed by Amendment VII to the Constitution, but also denied him his only right to appeal.

The judgment entered was final, appealable and all questions were before the Court of Appeals (App. 105a). The testimony of Dr. Raskind (App. 44a-62a), the treating physician, who gave all the testimony with reference to the permanentness of the injuries sustained by petitioner, was by way of deposition and equally as reviewable by the Court of Appeals as by the trial Court.

> Am. Eagle Fire Ins. Co. v. Eagle Star Ins. Co., 216 F. 2d 176 (9th Cir. 1954);
> Galena Oaks Corp. v. Scofield, 218 F. 2d 217 (5th Cir. 1954).

The Court of Appeals has abdicated its function of review. Manifestly it serves no purpose to say that petitioner would have a right to have this issue determined eventually after any number of new trials when the entire case was before the Court who has as equal ability to consider deposition evidence as has the trial Court. Thus the Court of Appeals is paving the way for the lower Court to invade the province of the jury and reweigh the evidence in any case so long as it does so under the guise of offering a plaintiff the option of a new trial when the trial Court, not for any legal reason, but because of its own personal ideas, doesn't

agree with the jury verdict. And this on clear controverted issues of fact.

II. INVASION OF PROVINCE OF JURY

Where facts are controverted a jury question is presented and while it is for the trial Court to determine in the first instance what facts and circumstances are admissible and competent as evidence of the damages sustained, and whether sufficient facts have been introduced to present a jury question about which reasonable minds might differ, it is for the jury to determine the existence, nature, extent and permanency of the injuries suffered and to assess the amount to be allowed therefor. When the jury has returned its general verdict the trial Court may not substitute its judgment for that of the jury if there is substantial evidence to support the verdict. On motion for new trial because of alleged excessiveness of the jury verdict the trial Court's only function is to consider whether there is substantial evidence to sustain the amount of the verdict.

> Werthan Bag Corp. v. Agnew, 202 F. 2d 119, 123 (6th Cir. 1953).

Tennessee well states the effect of a general verdict of the jury in Thoni v. Hayborn, 37 Tenn. App. 56, 260 S.W. 2d 376 (1953):

> "Finally, defendants complain about the amount of the verdict and judgment. The jury returned a general verdict. The effect of such verdict in the case on trial was to decide each issue in favor of plaintiff if there was material evidence to support such verdict.
>
> "This principle applies to injuries suffered by plaintiff; that is, this Court must treat all injuries within the scope of the pleadings as established if any material evidence is introduced to prove such injuries."

The trial Court had no right to reweigh the evidence in

this case and decide that petitioner had sustained no permanent disability. It is not only contrary to the undisputed facts and evidence in this case, it is contrary to repeated decisions of the Supreme Court of the United States.

In the case of Baltimore & Carolina Line, Inc. v. Redman, (1935) 295 U. S. 654, 657, 55 S. Ct. 890, 891, 79 L. Ed. 1636 the Supreme Court stated:

> "The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted . . ."
>
> "The aim of the Amendment, as this court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the Court."

In the case of Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 63 S. Ct. 444, 87 L. Ed. 610, 618 (1942) the Court was speaking of questions of disputed facts and said:

> ". . . Many years ago this Court said of problems of negligence, 'we see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. Tennessee, V. & G. R. Co., 128 U. S. 443, 445, 43 L. Ed. 478, 479. Or as we have put it on another occasion, 'where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences', the case should go to the jury."

This is the same as to all questions of fact whether they

be issues of negligence or issues concerning injuries, their nature, extent and permanency.

Perhaps the case which is cited most frequently is the case of Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1943). In that case a trial court had submitted the case to a jury which returned a verdict for the plaintiff. The 7th Circuit reversed the case holding that, while there was evidence of negligence (a factual question), there was no substantial proof that this negligence was the cause of plaintiff's decedent's death. The Supreme Court granted certiorari because of the important constitutional problems involved as to plaintiff's rights to a jury determination of the factual issue of causation. That Court stated:

> ". . . 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' Galloway v. United States, 319 U. S. 327, 395; Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. *No Court is then justified in substituting its conclusion for those of the twelve jurors.*"
>
> 321 U. S. at p. 32 (Emphasis supplied)

In the same case it was again stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws

the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Cases omitted). *That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored.* Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

id at 35 (Emphasis supplied)

In the case of Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946) the Court in discussing the function of the jury on questions of controverted facts stated:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, *it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."*

327 U. S. at page 653 (emphasis supplied)

This statement by the Supreme Court certainly has as equal application to the trial Court as to the Court of Appeals.

In the case of Ellis v. Union Pacific R. Co. 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572 (1947) the Court, in discussing

the evidence of negligence, and whether or not it was sufficient to go to the jury, stated:

> "*The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury.* Tennant v. Peoria & P. U. R. Co., 321 U. S. 29; Lavender v. Kurn, 327 U. S. 645. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. *For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable.* Lavender v. Kurn, supra (327 U. S. p. 652). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & G. R. Co. v. McDade, 135 U. S. 554, 572; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68."
>
> 329 U. S. at page 653 (Emphasis supplied)

These statements too apply with equal force to trial courts as to appellate courts. Justice and the application of basic constitutional principles is not to be tested by the level of the forum in which the matter is heard. All are guided and bound by the same rules.

III. REMITTITUR PRACTICE AND TRIAL COURTS DISCRETION

It is difficult, if not impossible, to justify the practice of remittitur in view of the common law and Amendment VII to the Constitution of the United States. Perhaps if the question had been properly raised in an early case it would never have been sanctioned as constitutional in our judicial system.

> Dimick v. Schiedt, 293 U. S. 474, 79 L. Ed. 603, 55 S. Ct. 296.

Even though the remittitur practice has been accepted by the courts for many years it is well recognized that the trial Court has no right to arbitrarily remit verdicts. In proper cases trial Courts have in the past been permitted to exercise their discretion and cure admittedly excessive verdicts by remittitur. However, this is not an unlimited discretion. It is subject to review for abuse.

So. Ry. Co. v. Madden, (4th Cir. 1956) 235 F. 2d 198; Cert. den.
352 U. S. 953, 1 L. Ed. 2d 244, 77 S. Ct. 328;
Milprint, Inc. v. Donaldson Co., (8th Cir. 1955) 222 F. 2d 898;
Steiner v. U. S. (9th Cir. 1956) 229 F. 2d 745.

The trial Court in the case at bar stated there was no improper motive of the jury (App. 102a). In fact, the trial Court acted because of the size of the verdict alone, it being larger than he would have given sitting without a jury and because he reweighed the evidence and decided there was no permanent injury (App. 102a-104a).

The trial Court reduced the verdict of the jury in this case, not because there was any error of law, but because the Court, in its own determination of the facts, felt the jury awarded too much for the injuries. In other words the Court determined that the verdict was excessive per se and therefore reduced it. There was no dishonest motive on the part of the jury and none was claimed by appellee (App. 102a). The Court merely stated that in its opinion the jury must have been under a misapprehension of the evidence on the injury and damage question.

That this is a factual question and one for the determination of the jury there is no doubt. As was stated in the case of Pariser v. City of New York (2nd Cir. 1945), 146 F. 2d 431, 433:

". . . If the amount of the verdict be regarded as in fact excessive, nevertheless it was the jury's estimate arrived at after a proper charge. Such a matter is not reviewable on appeal but is solely one of fact for the jury to determine. (Cases omitted)."

As is stated by the Court in the case of Cole v. Chicago, St. P. M. & O. Ry. Co., 59 F. Supp. 443, 446 (D.C.D. Minn. 1945):

"I am constrained to add that the power of the Court to set aside or reduce a verdict on the ground that it is excessive should be used with extreme caution. *Generally such action would result merely in a substitution of the opinion of the Court for that of the jury; in other words it ordinarily would be an invasion of the function of the jury by the Court and a denial of trial by jury.* Courts should respect the verdict of juries and not disturb them except in extreme cases and under rare circumstances. A verdict should not be set aside merely because it is excessive in the mind of the Court but only when it is so grossly excessive as to shock the Court's sense of justice and the impropriety of allowing it to stand is obvious . . ." (Emphasis supplied).

The question has been very ably discussed in the case of Jones v. Atlantic Refining Co., 55 F. Supp. 17, 19 (D.C.E.D. Pa. 1944) where the Court stated:

"Courts have, and sometimes exercise the power to set aside verdicts on the ground of excessiveness, yet it is a power to be cautiously used. Brown v. Evans, C.C. 17 F. 912, affirmed Evans v. Brown, 109 U. S. 180, 3 S. Ct. 83, 27 L. Ed. 898. Courts in general are most reluctant to disturb a jury's verdict on the ground of excessiveness where the damages are unliquidated and there is no fixed measure of mathematical certainty. This is particularly significant with respect to damages in tort actions for personal injuries. Armit v. Loveland, 3 Cir., 115 F. 2d 308, 314. The texts and authorities are consistent in holding that a verdict of the jury

will not be set aside as excessive unless it is clearly shown that the jury either disregarded the instructions of the Court or was influenced by passion, prejudice or corruption, or other improper motives. 'Of the various formulæ that have been allowed by the Courts for the determination of the question whether a verdict is excessive, the following one, employed by Chancellor Kent, in a libel case has been frequently quoted or paraphrased with approval in passing upon objections to verdicts as being excessive: "The damages, therefore, must be so excessive as as to strike mankind, at first blush, as being, beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the Court cannot undertake to draw the line; for they have no standard by which to ascertain the excess." The formula which is perhaps most frequently used is to the effect that to warrant interference the verdict must be so excessive as to appear to have been given under the influence of passion or prejudice.' 15 Am. Jur. 623. A verdict should not be set aside simply because it is excessive, in the mind of the Court, but only when it is so grossly excessive as to shock the Court's sense of justice, and the impropriety of allowing it to stand is manifest. (Cases omitted.) *When there is any margin for a reasonable difference of opinion in the matter, the view of the Court should yield to the verdict of the jury, rather than the contrary.* Smith v. Pittsburgh & W. R. Co., C.C. 90 F. 783. The Court must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors, for to do so would violate a constitutional privilege to have the fair verdict of the jury and not the fair judgment of the Court. However it may be expressed by a Court, summarized, the rule is, that the trial judge will not interfere with a jury's verdict simply because it is greater than his own estimate; only where the verdict is so grossly excessive as

to shock the conscience of the Court and clearly manifest that it was the result of caprice, passion, partiality, prejudice, corruption or other improper motives, will the Court intervene; and the theory always is that a Court will not set aside a verdict on this ground in an action of this character except in extreme and exceptional cases." (Emphasis supplied).

The essential holding of all these cases is that excessiveness per se is not a ground of remittitur unless it can be said that the amount awarded was so great as to strike all mankind immediately as being unreasonable. Not merely excessive to the trial Judge's views or the respondents' views. To be excessive the verdict must exceed the largest amount which any qualified jury acting reasonably would award. If reasonable men could have done so, the jury has functioned properly and improper influence may not be inferred by the trial Judge merely from the size of the verdict.

Tennessee Coal & Railroad v. Roddy, 85 Tenn. 400 (1887).

A review of verdicts in similar cases does not usually provide much help for it is the evidence of loss in each case which must govern the range of amounts which a reasonable jury could return. As to size alone, however, we invite the Court to examine any similar case and see the range of verdicts approved. For example $75,500 was approved for a man with a similar injury having two discs removed from his back and yet he was earning only about half what petitioner was earning and had a shorter life expectancy. Widder v. N. Y., Chi. & St. L. Ry., 142 F. Supp. 830. Fifty-five Thousand ($55,000) Dollars was approved for a man with the same life expectancy and loss of earning capacity in a similar type injury in Constentine v. A. & S. R. Co. 144 F. Supp. 39. Could we in truth say then, as the trial Court here has said, that this verdict is mon-

strous when in fact reasonable juries for years over the nation have given much larger verdicts for smaller losses?

Surely a reasonable jury in the case at bar could have awarded less or more than the $42,500 awarded to petitioner on the proof in this case where the uncontradicted testimony of the only doctor introduced said he had a 25% disability which he hoped to reduce to as low as 10% but had not been able to do. Upon loss of earning capacity alone without consideration of other admitted reasonable items of damage he would be entitled to a verdict between $83,565 and $33,433 upon undisputed earnings of $9110 annually and a 36.7 year's life expectancy (App. 74a). Size alone does not make a verdict excessive.

> Heavy Haulers v. Jones, ... Okla ...., 304 P. 2d 292 (1956).

IV. REVIEW OF REMITTED VERDICT

A. SUPERVISORY POWER OF SUPREME COURT

This Court has on repeated occasions exercised its broad powers of supervision over the lower Federal Courts where the interests of justice require it.

> Gibson v. Lockheed Aircraft Service, Inc., 350 U. S. 356, 100 L. Ed. 395, 76 S. Ct. 366;
> United States v. Minsingwear, 340 U. S. 36, 95 L. Ed. 36, 71 S. Ct. 104;
> Walling v. Reuter, 321 U. S. 671, 88 L. Ed. 1001, 64 S. Ct. 826;
> Supreme Court Rule 19(1)(b).
> Title 28 United States Code, Section 2106.

In the exercise of this supervision the Supreme Court and the Court of Appeals may reinstate a judgment for the plaintiff entered on a jury verdict which the trial Court has erroneously vacated and set aside.

Skelley v. New York, N. H. & Hartford R. Co., 93 F. 2d 479 (2nd Cir. 1938).

This is not a case brought merely for a review of facts. The case has been presented to and decided by a jury and the trial Court with the sanction of the Court of Appeals, states that a new trial is not necessary; however, the trial Court has so far exceeded his authority as to deprive petitioner of his constitutional rights. This case presents a question which strikes at the very roots of our jury system. How far may a trial Court go on a Motion for a New Trial in reviewing the jury verdict for the plaintiff? May the Court of Appeals ignore the unconstitutional acts of the trial Court?

The admonition of the Supreme Court to Appellate Courts in Federal Employees Liability Act cases is well taken here —that judges are not on the bench to substitute their ideas of negligence, and extent of injury if you please, for the ideas of the jury.

Rogers v. Missouri Pacific R. R., (U.S.), 77 S. Ct. 443 (1957).

The criterion governing the exercise of the Supreme Court's discretion in granting or denying certiorari is based upon whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.

Wilkerson v. McCarthy, 336 U. S. 53, 55, 70, 93 L. Ed. 497, 69 S. Ct. 413 (1949).

Review will be granted where the issue to be decided is fundamental to the case.

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209, 67 S. Ct. 1009;
U. S. v. General Motors Corp., 323 U. S. 373, 89 L. Ed. 311, 65 S. Ct. 357;
Aetna Cas. Co. v. Flowers, 330 U. S. 464, 91 L. Ed. 1074, 67 S. Ct. 798.

On writ of certiorari the Supreme Court can dispose of all questions arising on the record.

Donovan v. Pa. Co., 199 U. S. 279,
50 L. Ed. 192, 26 S. Ct. 91.

The Supreme Court will direct the disposition which should have been made in the Court of Appeals.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248.

It is the intention of the Federal Rules of Civil Procedure to prevent extended litigation and retrial of issues already determined. Even on remand the Court of Appeals should have limited a retrial, if necessary, to the issue of damages only.

Federal Rules of Civil Procedure,
Rule 59, Title 28 United States Code, Rule 59.
Gasoline Products v. Champlin Refining Co.
283 U. S. 494, 75 L. Ed. 1188, 51 S. Ct. 513;
Thompson v. Camp, 167 F. 2d., 733 (6th Cir. 1948).

The use of the Motion for New Trial is to aid trial Judges in the performance of their judicial duties; but, the exercise of the trial Judge's discretion in the matter of a new trial is not to displace the jury which is the trier of facts submitted to it. The exceptional circumstances in the instant case warrant the use of the supervisory power of the Supreme Court of the United States to restore the judgment entered on the jury's verdict (App. 89a). To do otherwise would mean the rules of procedure for trial by jury have been practically nullified by the District Judge.

Supervisory control of the District Court when there is a clear abuse of discretion and an invasion of the historic rights of the jury is necessary to protect judicial administration in the Federal system.

The discretion of a District Judge is not so elastic that

the District Judge is the sole judge of its elasticity, for litigants in damage suits are entitled to trial by jury and the discretion of the trial Judge in ordering a remittitur or in granting a new trial is not so elastic as to permit him in his discretion to substitute his verdict for the verdict of the jury.

B. ABUSE OF DISCRETION BY TRIAL COURT

Not only has the trial Judge unconstitutionally invaded the province of the jury here, but in addition he has abused any discretionary control he might have over the size of a jury verdict. As stated before an abuse of discretion is considered an error of law and reviewable on appeal.

Spero-Nelson v. Brown, 175 F. 2d 86
(6th Cir. 1949);
Sebring Truck Co. v. White, 187 F. 2d 486
(6th Cir. 1951);
Reisberg v. Welters, 111 F. 2d 595
(6th Cir. 1940);
Cases cited 6 Moore's Federal Practice
(2d. Ed.), pg. 3836 et seq.

We submit that this is a case where the trial Court has abused its discretion in reducing the jury verdict. In fact, the trial Court here did not exercise any discretion because it not only invaded the province of the jury and usurped its functions, but it went beyond the proof in its entry of a verdict. If the trial Court reduced the verdict because it found there was no permanent disability, then it invaded the province of the jury by taking this issue from them and re-weighed the evidence in respect to it. On the other hand, if the trial Court re-weighed the evidence and found a permanent disability different from that of the jury, it usurped the function of the jury as the trier of fact. Let us analyze the action of the trial Court in regard to the evidence in the record.

If the rule of remittitur, as applied in Federal Courts, is to reduce the verdict of the jury to the lowest amount that could reasonably be found by the jury (as the rule appears to be in Wisconsin - Meissner vs. Papas, E. D. Wis. 1940, 35 F. Supp. 676; Aff'd 7th Cir. 1941, 124 F. 2d 720) then the lowest verdict which would reasonably appear under the proof in this case which the jury could find would be $34,677.00 without allowing anything for (1) medical expenses at the time of trial, (2) future medical expenses, (3) past pain and suffering, (4) future pain and suffering, and (5) lost wages up to the time of trial. Giving the plaintiff-petitioner all favorable inferences from the evidence, as we must on a motion for a new trial brought by the defendant-respondent, this would base the verdict on a 10% loss of earning capacity or permanent disability, which is the lowest percentage of permanent disability that the jury could accept and it would be speculative to say that petitioner would improve this much from his present physical condition.

In this situation the trial Court has abused any discretion it might have because it has reduced the verdict below even this minimum figure which a jury could find from the evidence.

On the other hand, if the rule of remittitur in the Federal Court is to reduce the verdict only to the maximum amount that a reasonable jury could find from the evidence (as appears to be the majority rule as shown in International Paper Co. v. Busby, 5th Cir. 1950, 182 F. 2d 790, 793; Yurkonis v. Delaware L. and W. R. Co., E. D. N. Y. 1914, 213 Federal 537, 538; Aff'd 2d Cir. 1915, 220 F. 429; Aff'd 1915, 238 U. S. 439, 35 S. Ct. 902, 59 L. Ed. 1397; and other cases cited in Volume 6 of Moore's Federal Practice, 2nd Edition, page 3744, beginning notes 27 et seq), then this trial Court has abused its discretion for if the jury believed from the

evidence, which they might very readily have done, that plaintiff would continue to have a 25% disability which Dr. Raskind testified that he had at the time of trial, he had a loss of earning capacity alone which would amount to approximately $83,630.00 which would not include (1) medical expenses prior to the trial, (2) medical expenses at the time of the trial, (3) future medical expenses, (4) past pain and suffering, (5) future pain and suffering, and (6) loss of wages at the time of trial.

V. IS THIS VERDICT IN FACT EXCESSIVE?

A. PROCEEDINGS

The jury in this case returned a verdict for the petitioner for personal injuries assessing his damages at $42,500 (App. 88a). Upon this verdict of the jury judgment was entered (App. 89a). The trial Court vacated and set aside this verdict of the jury and the judgment entered thereon and entered its own judgment for $25,000 (App. 105a) because the trial Court redetermined an issue of fact as to whether or not petitioner's injuries were permanent.

B. PETITIONER'S INJURIES PERMANENT

The record does not support the trial Judge's interference with the jury verdict. The determination of whether petitioner sustained a permanent injury is for the jury to decide and the record supports the submission of this issue to the jury.

In this case, the only medical evidence introduced upon the issue of the permanency of the injury sustained by the plaintiff-petitioner, was the evidence introduced on behalf of the petitioner. This evidence was not contradicted by the respondent, even though respondent had requested that the petitioner be examined by Dr. Nicholas Gotten, a very

well known neuro-surgeon of Memphis, Tennessee, to whom the petitioner went without objection. The respondent had the petitioner examined by Dr. Gotten and yet did not produce him at the trial to testify. (App. 36a). This was for the obvious reason that he would have supported petitioner's evidence of permanent disability.

> "It is true that where a party has it within its power to produce a witness who was in position to know the facts, and was apparently favorable to him, his failure to call such witness affords an inference that the testimony of the witness would not support his contentions. This rule has been applied in numerous cases by our Supreme Court and by this court. . . ."
>
> Waller v. Skeleton, 31 Tenn. App. 103, 212 S. W. 2d 690; 697 (1948);
>
> See also White v. Seier, 37 Tenn. App. 437, 264 S.W. 2d 241 (1953).

We also call to the Court's attention: (1) that the trial Judge charged the jury that in their consideration of damages to be awarded to plaintiff-petitioner, they might consider and determine whether or not he suffered any permanent disability (App. 86a); (2) the trial court refused to withdraw from the jury's consideration this question of fact as to permanent disability when the Court was requested to do so by the respondent (App. 87a-88a); (3) the respondent in its motion for a new trial alleged error on the part of the trial court because it instructed the jury that they might assess damages for permanent disability if they found such and, further, that the trial Court erred in failing to withdraw this issue from the jury (App. 90a-93a); and all of these grounds in respondent's motion were overruled by the trial Court (App. 102a).

What is the uncontradicted and undisputed medical proof in this record which shows the permanency of the injuries of the respondent?

Bear in mind that the respondent had suffered an injury to his lower lumbar back which required the surgical removal of a centrally protruded intervertebral disc at the L-4 inter-space and, also, a protrusion of the intervertebral disc at the L-5 inter-space, with compression of the S-1 nerve root on the left (App. 45a). Respondent admits this is a substantial injury and petitoner is entitled to substantial damages (App. 96a).

Dr Raskind testified:

"Q. Doctor, you did remove two discs, did you not?

"A. Yes, he had a very definite central protrusion of the disc at the L-4 inter-space and L-5 inter-space."

* * * * *

"Q. Did you have to put Mr. May back in traction after surgery?

"A. No, not since surgery, but the 9th of this month (March 1956) he was put back in the hospital for some further physio-therapy. He had too much post-operative back irritability and I was trying to reduce that.

"Q. Since the operation, have you seen Mr. May?

"A. Yes, I saw him on January 6th and again on March 6th (1956).

"Q. Doctor, state whether or not he has received the relief you had expected he would?

"A. No, he has not received the relief I expected; he has more back irritability than he should have following disc removal." (App. 52a-53a).

* * * * *

"Q. Can you give us an estimate of the disability which Mr. May has sustained as a result of this injury?

"A. I would say *currently on the basis of restricted motion of the lumbar spine and pain on certain activities, his disability is 25% of the body as a whole*, and *if* the physio-therapy is a success, his degree

of disability should be less at the conclusion of the physio-therapy.

"Q. Doctor, what criterion do you use to measure this percentage of disability?

"A. The low back has a range of 90 degrees flexion, 15 to 20 to 25 degrees lateral and currently his restriction is approximately 50%. I also took into consideration the muscle spasm and segmentation. He has no leg signs at the present time and *his disability is based on the malfunction of the back which in my opinion, currently is 25% of the body as a whole.*" (App. 53a-54a) (Emphasis supplied).

• • • • •

On cross-examination Dr Raskind said:

"Q. Doctor, is it true you expect *some* improvement as time goes by?

"A. We will put it this way, *I am not happy with a 25% permanent partial disability.* I *usually* do better than that, *usually it is* 10% *to* 15% and sometimes even better than that, and that is the reason I have him in the hospital and am still working with him." (App. 61a) (Emphasis Supplied).

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"Q. Doctor, in this particular case, *do you expect Mr. May to have some eventual permanent partial residual disability?*

"A. Yes; I would say being overweight to start with and *having the difficulty he has already had, I do not expect him to make a complete recovery.*" (App. 62a) (Emphasis supplied).

The plain undisputed evidence in this case is that petitioner has a permanent partial disability presently of 25% of the body as a whole. Dr. Raskind says that *if* the physio-therapy is a success his degree of disability *should be less.* He does not say that it will be. He also states in response to the respondent's cross-examination that he is not happy

with *the 25% permanent partial disability;* that he *usually does better than that, usually it is 10% to 15%*. He does not attempt to say that he will get a better result than 25% permanent partial disability and the reason is obvious. The plaintiff-petitioner had *more back irritability after the operation than is normal* and that is why he had to put him back in the hospital for further treatment. (App. 61a).

To state, as the trial Judge did, that it would be highly speculative to say that petitioner had any permanent disability, is to completely contradict this undisputed testimony, not with evidence in the record, but by the Court's own determination.

C. THIS VERDICT IS NOT EXCESSIVE

This verdict is certainly not excessive. In fact on the proof in this record it is a small verdict. Not only the substantial evidence but all the evidence in the record supports this verdict.

The trial Court properly charged the jury the elements they could consider in reaching their verdict including whether petitioner's injuries were permanent and whether petitioner had or would sustain a loss of earning capacity (App. 85a-86a).

The jury is also entitled to take into consideration in determining its verdict inflation, the high cost of living and the decreased purchasing power of the dollar.

> Wesco Paving Co. v. Nash, 35 Tenn. App. 409, 245 S.W. 2d 782;
> Foster Creighton Co. v. Hale, 32 Tenn. App. 208, 222 S.W. 2d 222;
> Waller v. Skeleton, 31 Tenn. App. 103, 212 S.W. 2d 690.

Respondent notes that petitioner would be entitled to substantial damages on the proof in the record (App. 96a).

Respondent does not question the fact that petitioner suffered extreme physical pain and mental anguish which commenced at the time of injury and continued to the date of trial some nine months later. Respondent does not question the fact that this pain and suffering will continue in the future. There is no dispute or contradiction that petitioner was in the hospital from August 12 through August 24, 1955, for treatment by traction; that he was in the hospital from September 1 through September 10, 1955; that on September 2 a myelogram was performed on him with its attendant pain and discomfort (like having a football needle up his back he states); that he was in the hospital for the third time from November 29 through December 10, 1955; that on November 30 he was operated on for the surgical removal of two (2) herniated intervertebral discs with all its attendant pain and misery; that he was back in the hospital March 9, 1956, and stayed through the trial of this case (and according to Dr. Raskind he would be there for ten to fourteen days).

It is not disputed nor does the respondent attempt to contradict the fact that petitioner has continued to have a very irritable back, his pain and suffering being severe after the operation (App. 52a). Petitioner has not received the relief that Dr. Raskind expected after the operation and has had more back irritability than he should have following the removal of these two herniated discs (App. 53a).

There is no dispute and no contradictory proof is offered that petitioner has presently a 25% permanent disability (App. 53a). It is suggested that this 25% permanent disability may improve IF the physio-therapy is successful (which it has not been in the past). The improvement, if any, may only leave him with a residual permanent partial disability of 15% (App. 61a). Dr. Raskind states, however, and his testimony is not contradicted, that he does not ex-

pect a complete recovery in this case (App. 62a). It is further to be noted that the respondent, at its own request, had petitioner examined by Dr. Nicholas Gotten. The respondent did not see fit to introduce Dr. Gotten or secure his testimony before the Court and jury when his testimony was readily available. Surely, if Dr. Gotten could have helped respondent, its attorney would have had him testify.

Petitioner had medical bills up to January 6, 1956, amounting to $1,225.04 which did not include the expenses for his medical care and treatment while in the hospital during the trial of this case and thereafter (App. 74a); and he was scheduled to go through the same processes again. This easily covers $2500.00 of any damages awarded.

There is no dispute in this record that petitioners' earnings for 1955, based mostly upon work which he did prior to July 13, 1955, the date of the accident, were $9,115.00. There is no dispute that for the past three years his earnings have increased on the average of 15% each year (App. 20a-21a).

There is no dispute nor any attempted contradiction of the testimony of John Flagg, Financial Manager of Graybar Electric Co., Inc., that the sales records of all the salesmen in this district for Graybar have been *up* in 1956 over 1955 with the exception of petitioner, whose production record has continued to decrease and that for the first two months of 1956 his record is down 10% under 1955; and that Graybar has had to put another salesman into Charlie May's territory to pick up his volume (App. 68a-69a). Petitioner's income is based on his sales production and volume and he has already lost 10% of this.

There is no dispute nor contradiction by the respondent that the evidence in this case shows clearly that Charlie

May cannot now do the things he used to do at home, at work and in outside activities; and the evidence all shows that this condition is permanent.

There is no dispute that Charlie May tried hard to keep on with his work but he has lost over three and a half months time from work since his accident in July 1955. The plaintiff is entitled to recover from the jury for lost wages, if the jury finds he lost wages. This is substantial evidence supporting over $2600.00 of the jury's verdict.

> Railroad v. Porter, 117 Tenn. 13, 94 S. W. 666;
> Majestic v. L&N, 147 F. 2d 621 (6th Cir. 1945)

So we have a well man made sick and lame by the negligence of the defendant. The fact that petitioner was seriously injured and is now seriously injured has been shown to exist by uncontradicted and substantial proof and this fact of petitioner's condition will continue to exist until the contrary is shown; and the burden of proving facts to the contrary is upon the respondent, which has offered no such evidence, but relies wholly upon the hopes of Dr. Raskind that he can reduce petitioner's permanent disability from 25% to 10-15% and not upon his performance to do so.

The proof is that petitioner, Charlie May, a young man of 28 years with a wife and three young children, and with a future life expectancy stipulated to be 36.7 years, had achieved an enviable and responsible position with Graybar Electric Co. Inc.; their top salesman in this entire district and with every opportunity to advance in the Company both financially and in position; that the position he had attained and his future advancement depended upon his constant activity, his aggressiveness, his ability to get out of the offiice and keep customer contacts, and his doing night work; and his earnings were completely dependent upon his volume of sales, his production for the Company.

He cannot now do what is required of him to maintain his attained position, much less increase his position and production, and as a result of the injuries he has sustained his production has already dropped more than 10%. His permanent physical impairment will not only reduce his present earning level, but will prevent him in the future from increasing his present earning level as he had been doing each year in the past.

The record in this case shows that Charlie May lost over three (3) months from his work which at his prior earnings amounts to $2277.00. When this amount is subtracted from the $40,000.00 you leave $37,773.00.

It is undisputed and clearly shown by the substantial evidence in this case that Charlie May has presently a 25% disability.

The loss of earning capacity of 25% disability upon the amount of earnings shown for 1955 ($9115 x 25% x 36.7 years) makes a loss of earning capacity of $83,639.30.

If, for purposes of argument, we assume that petitioner's permanent disability may decrease in the future, which is contrary to law and is highly improbable after this length of time and all the treatment he has had, it might decrease to 15% and at this percentage of permanent disability his loss of earning capacity is ($9115 x 15% x 36.7 years) making $50,158.90.

These two amounts do not take into consideration the fact that he probably would have had *increased earnings* in the future over the $9115 had he not been injured.

These amounts do not take into account the pain and suffering which he went through in the past by virtue of the hospital stays, the myelogram, the operation and the physiotherapy.

These amounts certainly do not take into consideration the pain, suffering and mental anguish which he will have in the future, and the lack of ability to do those things in the future which he was able to do in the past. A strong, unblemished body vigorous and alert and free from pain is dear to Charlie May; and his constitutional rights to have his damages assessed by a jury cannot be ignored by some theoretical speculation that he will improve in health and have no permanent disability when the proof in the record is completely to the contrary.

In this record the substantial evidence would warrant the jury in returning a verdict for Charlie May, petitioner, substantially in excess of what has been returned. The jury has not nearly compensated him for his loss of earning capacity, his pain and suffering and the permanent nature of his injuries.

We first respectfully submit that the general verdict of the jury in this case was not only not excessive, but that in fact from the substantial proof in this case it hardly compensates him for the injuries inflicted upon him by the negligence of the respondent.

Second; we submit that the trial court has unconstitutionally invaded the province of the jury, redetermined facts which they are the constitutionally appointed tribunal to determine and has deprived petitioner of his constitutional right to trial by jury as guaranteed to him by Amendment VII to the Constitution of the United States.

Thirdly, we submit that the Court of Appeals, in refusing to review this constitutional issue, has abdicated its function as an appellate court of review, sanctioned the action of the trial Court in invading the province of the jury and permitted the petitioner to be deprived of his constitutional right to trial by jury by the trial Court.

It is respectfully submitted that the questions presented by petitioner are substantial and of public importance and that grave questions of constitutional rights are raised; that the verdict of the jury rendered in this case (App. 88a) should be restored and the judgment entered thereon should be reinstated (App. 89a).

Respectfully submitted,

CLARENCE CLIFTON

JOHN B. MACK

1814 Exchange Building
Memphis 3, Tennessee
Counsel for Petitioner,
Charlie E. May

CERTIFICATE OF SERVICE

I, Clarence Clifton, a member of the bar of the Supreme Court of the United States and of counsel for the petitioner in the above entitled case, hereby certify that on this day I served true and correct copies of the foregoing petition for writ of certiorari on Ferber S. Floyd, counsel for respondent, by depositing the same in the United States mails properly addressed to him at his address in the Columbian Mutual Tower Building, Memphis, Tennessee, with proper postage prepaid.

This 15th day of May, 1957.

CLARENCE CLIFTON

1814 Exchange Building
Memphis, Tennessee

APPENDIX A.

TO JURISDICTIONAL STATEMENT

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 6, 1957 (FORMAL PARTS OMITTED)

BEFORE

HON. JOHN D. MARTIN, SHACKELFORD MILLER AND POTTER STEWART

CIRCUIT JUDGES

JUDGMENT

In a suit for personal injuries arising from an automobile accident, appellant was awarded a jury verdict of $42,500. On motion for a new trial, the district court entered judgment for $25,000 without obtaining the consent of appellant, concluding that in view of the testimony on the extent of injury the "verdict was so excessive as to shock the conscience of the Court." There is no question under these circumstances that the trial judge had the discretionary power to order a new trial, but the district court committed error by reducing the verdict without giving appellant the option of either accepting a remittitur or of having a new trial. *Kennon* v. *Gilmer*, 131 U. S. 22, 27-30 (1889); *Dimick* v. *Schiedt*, 293 U. S. 474, 482-85 (1935).

Upon remand the district court will have the power either to grant or deny a new trial generally or to deny a new trial on the condition that appellant accept a judgment for a lesser amount than the jury verdict.

The judgment is set aside and the case is remanded to the district court for reconsideration of the motion for a new trial.

APPENDIX B.

TO JURISDICTIONAL STATEMENT

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION OVERRULING MOTION FOR NEW TRIAL, DIRECTING REMITTITUR AND ENTERING FINAL JUDGMENT. FILED MAY 8, 1956 (FORMAL PARTS OMITTED)

ORDER OVERRULING MOTION FOR NEW TRIAL AND DIRECTING REMITTITUR AND FINAL JUDGMENT

This cause came on to be heard on Friday, May 4, 1956, upon a motion for a new trial duly filed herein by the defendant, Ellis Trucking Co., Inc., upon briefs, and upon arguments of counsel in open Court, and upon the entire record in this cause, from all of which it is Considered, Ordered and Adjudged by the Court:

A motion for a new trial is overruled except with respect to Paragraphs III and IV.

The Order heretofore entered on the jury's verdict awarding judgment against the defendant, Ellis Trucking Co., Inc. for $42,500.00 is hereby vacated and set aside.

A new trial will not be necessary in this case and it is here ordered that the jury's verdict be reduced to $25,000.00.

It is now ordered that on the verdict of the jury rendered herein, the plaintiff, Charlie E. May, have and recover of the defendant, Ellis Trucking Co., Inc., the sum of $25,000.00 as compensatory damages for personal injuries and the sum of $1110.00 as property damages, all with interest at

the rate of six (6%) per cent annum from March 16, 1956, and all the costs of this cause for which plaintiff shall have execution, to all of which action of the Court plaintiff duly excepted and his exceptions are here noted by the Court.

The opinion of the Court is here made a part of the record in this cause.

This 8th day of May, 1956.

MARION S. BOYD,
Judge